STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEDRICK LAMAR THOMAS,

Defendant-Appellant.

UNPUBLISHED
November 1, 2002

No. 232285
Saginaw Circuit Court
LC No. 00-018443-FH

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; two counts of assault with intent to commit murder, MCL 750.83; and felony-firearm, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 7 to 15 years for the assault with intent to do great bodily harm conviction and 20 to 40 years for each of the assault with intent to commit murder convictions. Defendant also received two years' imprisonment for the felony-firearm conviction to be served consecutive to his other sentences. Defendant appeals as of right. We affirm.

This appeal arises out of a drive-by shooting that resulted in injury to a man and a two-year old child. Several witnesses gave descriptions of the car and the shooter. The two men who were fired upon subsequently identified defendant as the shooter and picked him out of a photographic line-up. Defendant testified that he was with a friend at the time of the shooting.

Defendant initially alleges that his right to due process was denied by the prosecution's failure to disclose notes made by the police while interviewing defendant's alibi witnesses. Defendant also claims that his rights were further infringed by the police and the prosecution's belated investigation into his alibi. Thus, defendant contends that the trial court should have granted his motion for mistrial at the conclusion of the opening statements. We disagree. This Court reviews a trial court's refusal to grant a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

A prosecutor is required to disclose material evidence that is favorable to the defendant. *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). "Evidence is material only if there is a reasonable probability that the trial result would have been different, had the evidence been disclosed." *Id*. Upon request, the prosecution must also provide the defendant with any police reports concerning the case. MCR 6.201(B)(2). Similarly, MCR 6.201(A)(2) requires disclosure of "any written or recorded statement by a lay witness whom the party intends to call at trial . . . ." However, the term "statement" in this context does not pertain to notes made in the course of an investigation unless the witness signs or adopts the notes. See *People v Holtzman*, 234 Mich App 166, 178-179; 593 NW2d 617 (1999).

In the instant case, the information obtained through the interviews was not exculpatory or favorable to defendant. Rather, the witnesses interviewed either failed to identify defendant or could not place him in their respective stores at the time of the incident. Moreover, no formal police report was ever made regarding the interviews. Further, while the detective made notes of the interviews, none of the witnesses signed or otherwise adopted these notes.[1] We also note that due process does not require the police to seek and find alleged exculpatory evidence for defendant. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997). Accordingly, we find no abuse of discretion in the trial court's decision to deny the motion for a mistrial. *Dennis, supra* at 572.

Defendant next maintains that the photographic line-up was unduly suggestive. We disagree. The admission of identification evidence is reviewed for clear error. *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). However, defendant's failure to object to the photographic line-up limits our review to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The relevant factors to be considered include: the witness' opportunity to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of any prior description; the level of certainty displayed by the witness at the time of the pretrial identification; and the amount of time between the crime and the confrontation. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

Defendant primarily contends that the individuals chosen for the array were either darker skinned or bore no resemblance to his picture. We note that only physical differences apparent to the witness and that substantially distinguish defendant from the other line-up participants are significant. *Hornsby, supra* at 466; see also *People v Richmond*, 84 Mich App 178, 181; 269 NW2d 521 (1978). Further, such differences usually affect the weight of the evidence and not its admissibility. *Hornsby, supra* at 466.

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[1] The record shows that at the conclusion of opening statements the trial court ordered the prosecution to provide copies of these notes to defendant.

Nevertheless, the totality of the circumstances in the instant case does not suggest that the photographic line-up was so impermissibly suggestive that it led to defendant's misidentification. *Hornsby, supra* at 466. In fact, the witnesses testified that they knew defendant. One of the witnesses went to high school with defendant and the other recognized his face from the area. These two witnesses identified defendant as the shooter from an array of six photographs. The record shows that the witnesses had an opportunity to see the shooter at the time of the crime and described him as being light skinned, clean shaven, and having braided hair. Moreover, the identification took place within two days of the shooting. The record does not indicate that the witnesses expressed any uncertainty when identifying defendant. Furthermore, only two weeks passed between the date of the crime and the preliminary examination. See *Colon, supra* at 696 (finding that a two week time span does not reduce the reliability of the identification). On this record, we find no plain error. *Carines, supra* at 763-764.

To establish ineffective assistance of counsel, defendant must show that but for counsel's error, the result of the proceedings would have been different. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Because there is no indication from the record that the witnesses' identification of defendant from the photographic line-up was due to any improper influences, defendant has failed to prove that his counsel was ineffective. *Id*.

Defendant further contends that he was denied a fair trial because the prosecution improperly introduced hearsay evidence of a witness' identification of defendant without first establishing an adequate foundation. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001). However, if the decision involves a question of law this Court will review the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Nevertheless, defendant's failure to object to this testimony limits our review to plain error affecting his substantial rights. *Carines, supra* at 763-764.

Pursuant to MRE 801(d)(1), a prior statement is not hearsay if "[t]he declarant testifies at the trial . . . [,] is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person . . . ." At trial, Frank Gaskew testified that he never saw the shooter. Mr. Gaskew further claimed that he could not remember speaking with police officers about the shooting or identifying defendant as the shooter. Because Mr. Gaskew was subject to cross-examination concerning his prior statement in which he identified defendant as the shooter, the contested testimony was not hearsay. MRE 801(d)(1). Thus, defense counsel was not ineffective for failing to object. See *Carbin*, *supra* at 599-600; *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant additionally opines that he was denied a fair trial when a police officer testified that he obtained a photo of defendant that the police had "from the past." We disagree. Because defendant did not object to this testimony, our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763-764.

Police witnesses have a special obligation to avoid venturing into forbidden areas while testifying. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). However, "an isolated or inadvertent reference to a defendant's prior criminal activities" does not justify reversal. *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973). In this case, the detective's comment about a "photo from the past" was brief, vague, and not inherently

prejudicial. See *id*.; *People v Eaton*, 114 Mich App 330, 337; 319 NW2d 344 (1982). This vague reference to a possible criminal record was also not deliberately injected into the proceedings. *Wallen*, *supra* at 613. Numerous witnesses identified defendant as the shooter, and the vague reference to a past photograph did not divert the jury from the evidence properly presented.

We further find that defense counsel's failure to object to this testimony did not rise to the level of ineffective assistance. See *Carbin*, *supra* at 599-600. It may have been trial strategy to refrain from objecting and therefore highlight the testimony. See *People v Rodgers*, 248 Mich App 702, 718; 645 NW2d 294 (2001). We will not substitute our judgment for that of trial counsel regarding matters of strategy. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

Defendant ultimately asserts that the prosecutor argued facts not in evidence during closing argument. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Specifically, defendant refers to the prosecutor's suggestion that defendant's alibi witness was referring to notes when he spoke with police over the phone. However, a prosecutor may argue that a witness's testimony is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor is also permitted to argue reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). In the case at bar, the prosecutor's remarks during closing argument were reasonable inferences based on the facts. While defendant claimed that he was with a friend at the time of the shooting, several witnesses' identified defendant as the shooter. Thus, it was reasonable for the prosecutor to argue that the testimony of defendant's alibi witness was contrary to the testimony of other witnesses.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Robert J. Danhof